NO. 83-1219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE MACON TELEGRAPH PUBLISHING COMPANY
Petitioner,

v.

BETTY H. ELLIOTT
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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RESPONDENT'S COUNTER-STATEMENT OF THE CASE

This action involved a complaint for liable based on an article which accused Respondent with improper conduct as a juror during a double murder trial. Following the trial, Petitioner's reporter called Respondent, and based on his assurances that her conversation was not for publication, she talked with Petitioner's reporter.

The evidence clearly showed that Respondent did not talk to the reporter at all about when she made up her mind to vote, was not even remotely asked a question concerning when she made up her mind, and that she had not, in fact,

made up her mind a day or two before the case went to the jury.

Despite that, the reporter fabricated a story which was published the next day stating that Respondent decided to vote not guilty a day or two before the case went to the jury.

As a direct result of the false accusation in Petitioner's article, Respondent's friends refused to associate with her for six to seven weeks, her sense of responsibility was questioned, her foster son testified that he did not think too highly of Respondent because of the article, and her conduct was deemed stupid and was laughed about and discussed with other people by her friends. In addition, Respondent herself was highly embarrassed that her competency had been questioned, and even had a stranger stop her and question her actions.

The trial judge fully and repeatedly charged the jury concerning the actual malice requirements of proving knowledge of the falsity or reckless disregard of the truth of the story published by Petitioner. The jury then returned a verdict for $50,000.00 actual damages and $150,000.00 of the $200,000.00 requested by Respondent as exemplary damages for printing a false, fictional story. Petitioner then appealed to the Court of Appeals of the State of Georgia, but did not raise any constitutional questions whatsoever in its enumeration of errors (see Appendix A). The Supreme Court of the State of Georgia then granted and later vacated a Writ of Certiorari in which Petitioner attempted to interject for the first time issues of a constitutional nature. The Georgia Supreme Court granted the Writ of Certiorari, and after receiving briefs and hearing oral argument from both parties, vacated the Writ as having been improvidently granted, thus making no ruling in the case.

A stay of execution was denied by Justice Lewis F. Powell on December 27, 1983. Petitioner paid the judgment

in full on December 29, 1983.

Petitioner now applies for certiorari to this Court on the basis of still other constitutional issues, none of which were raised in the trial court nor presented to the only appellate court to render a decision of this case.

REASONS FOR NOT GRANTING THE WRIT

A. NO FEDERAL QUESTION WAS RAISED OR RULED ON IN THE STATE COURTS.

The review of the final judgment of a State Court is governed by 28 U.S.C. § 1257. The statutory requirement that Petitioner adequately present a federal question which is ruled on by the State Court has not been met in this case. On the contrary, Petitioner raised only standard State law objections to the trial court and standard State law objections to the Court of Appeals. Petitioner abandoned a constitutional objection to a State statute raised in its answer at trial, because Respondent declined to request a charge to the jury under a constitutionally infirm statute and instead presented requested instructions on actual malice based on this Court's decisions in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974).

Petitioner's constitutional questions were never raised by the Petitioner until the Petition for Certiorari was filed with this Court. The Georgia Court of Appeals never mentioned them in their opinion of March 10, 1983, and the Georgia Supreme Court never addressed them due to the vacating of their Writ of Certiorari. Because these issues were not properly raised or ruled on in the Court below, this Court should apply its "long settled rule that the jurisdiction of this Court to re-examine the final judgment of a State court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the State system." *Webb v. Webb,* 451 U.S. 493 (1981). For that reason, the Writ for Certiorari should not be granted to allow review of the judgment below.

B. A FICTIONAL STORY ACCUSING A JUROR OF IMPROPER CONDUCT IN VIOLATION OF HER OATH, WHICH RESULTS IN PROVEN DAMAGE TO HER REPUTATION IS LIBELOUS AND MEETS THE ACTUAL MALICE REQUIREMENTS OF THE CONSTITUTION FOR AWARD OF EXEMPLARY DAMAGES.

Even if this Court finds that jurisdiction is possible in this case, the questions raised by Petitioner are of no merit and do not warrant a grant of certiorari to review the judgment of the Georgia Court of Appeals.

The first issue, that the publication is not defamatory, is totally refuted since in Georgia, in the case of *Garland v. State*, 211 Ga. 48 (1954), the Georgia Supreme Court specifically held that it is improper conduct and a violation of the juror's oath and duty to make up her mind "until all the evidence has been submitted, and the court has instructed the jury as to the law." *Garland* at 50. As a result of the accusation that she had violated her oath and made up her mind in the middle of the trial, Respondent suffered actual, proven damage to her reputation in the form of disassociation from her by her friends, strangers questioning her integrity, her foster son stating that he did not think too highly of her due to the article, and her friends calling her stupid and talking and laughing about her among themselves. This, in addition to her personal embarrassment and humiliation, more than adequately proved actual injury to her reputation, which is the very heart of the tort of liable, and provided a firm foundation for the award of actual damages.

The remaining issues raised by Petitioner all deal either with the exemplary damages awarded, or the constitutional requirement that actual malice must be proven before a

private party plaintiff is entitled to exemplary damages. In this case, it is unquestionable that a fabricated story meets the actual malice requirements of the Constitution that the article was printed "with knowledge that it was false." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

This Court held as much in *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 252 (1974). There, this Court ruled that proof of "calculated falsehood" clearly met the requirements for proof of publication with knowledge of the falsity of the story.

In addition, the trial court clearly, correctly, and repeatedly charged the jury that it must find that the article was published with actual malice, that is, by finding that the article was published knowing it was false or with reckless disregard of the truth. The jury, based on their finding that the article was fabricated by Petitioner, returned a verdict for $50,000.00 less than was requested by Respondent for exemplary damages.

Such a finding of exemplary damages for printing a knowing falsehood, not merely a falsehood made in reckless disregard of the truth, is clearly justified, and is fully supported by the decisions of this Court. In *Gertz v. Robert Welch, Inc.*, this Court stated the following:

> There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.

Id., at 340

This story was more than mere careless error. The story was shown to be an intentional lie. Such a fabrication clearly meets the requirement that actual malice be shown, thus authorizing the award of exemplary damages.

CONCLUSION

A Writ of Certiorari should not issue because no federal questions were raised or ruled on in the Georgia Courts and because the jury verdict was founded both on clear proof that the story was fictional and actually damaged Respondent's reputation, and on a full and accurate charge of law concerning actual malice.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF GEORGIA

THE MACON TELEGRAPH PUBLISHING COMPANY, *Appellant,* vs. BETTY H. ELLIOTT, *Appellee.*	CASE NO. 65201

ENUMERATIONS OF ERROR

1.

The Trial Court erred in overruling Appellant's Motion For Summary Judgment.

2.

The Trial Court erred in overrulling Appellant's Motion For Directed Verdict at the close of Appellee's evidence.

3.

The Trial Court erred in overruling Appellant's Motion For Directed Verdict at the close of all of the evidence.

4.

The Trial Court erred in entering judgment on March 2, 1982, in favor of Appellee and against Appellant ordering that Appellee recover of Appellant the sum of Fifty Thousand Dollars ($50,000.00) actual damages and One Hundred Fifty Thousand Dollars ($150,000.00) punitive damages with interest thereon at the rate of twelve percent (12%) as provided by law, and cost of action.

5.

The Trial Court erred in overruling Appellant's Motion For Judgment Notwithstanding the Verdict.

The Trial Court erred in overruling Appellant's Motion For New Trial as amended on the following grounds, to-wit:

(a) The verdict is contrary to law.

(b) The verdict is contrary to the evidence.

(c) The verdict is strongly against the weight of the evidence.

(d) The award of actual damages in the sum of Fifty Thousand Dollars ($50,000.00) is so excessive as to indicate bias and prejudice on the part of the jury.

(e) The award of One Hundred Fifty Thousand Dollars ($150,000.00) in punitive damages is so excessive as to indicate bias and prejudice on the part of the jury.

(f) It was error for the Trial Court to allow witnesses MARY ANN GOSS, TOMMY BURKHALTER and MARY ROSE BUSH to testify over objection and state their subjective reaction to the words complained of.

(g) It was error for the Trial Court to charge the jury with Plaintiff's/Appellee's written Request to Charge No. 3.

(h) It was error for the Trial Court to charge the Plaintiff's/Appellee's Request to Charge No. 4.

(i) It was error for the Trial Court to refuse to charge Defendant's/Appellant's written Request to Charge No. 1.

(j) It was error for the Trial Court to refuse to charge Defendant's/Appellant's written Request to Charge No. 4.

(k) It was error for the Trial Court to refuse to charge Defendant's/Appellant's written Request to Charge No. 6.

(l) It was error for the Trial Court to refuse to charge Defendant's/Appellant's written Request to Charge No. 8.

(m) It was error for the Trial Court to refuse to charge Defendant's/Appellant's written Request to Charge No. 9.

(n) It was error for the Trial Court to refuse to charge Defendant's/Appellant's written Request to Charge No. 13.

(o) It was error for the Trial Court to refuse to charge Defendant's/Appellant's written Request to Charge No. 14.

(p) It was error for the Trial Court to refuse to charge Defendant's/Appellant's written Request to Charge No. 16.

(q) It was error for the Trial Court to refuse to charge Defendant's/Appellant's written Request to Charge No. 18.

STATEMENT OF JURISDICTION

The Court of Appeals of Georgia has jurisdiction of this appeal by virtue of the fact that it is an appeal from an overruling of an amended Motion For New Trial, judgment awarding Appellee damages for alleged libel and the overruling of Motions For Summary Judgment, Directed Verdict and for Judgment Notwithstanding the Verdict in said case the subject matter of which is not within the jurisdiction of the Supreme Court by virtue of Article VI, Section II, Paragraph IV of the Constitution of Georgia of 1976 (Ga. Code § 2-3104).

Respectfully submitted,

/s/ _____

ED S. SELL, III

/s/ _____

E. S. SELL, JR.

/s/ _____

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